Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, On Her Own Behalf and as Guardian for the Minor, MARVIN JOHN BORJA,

Petitioner,

vs.

JOSE C. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDERICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent, Department of Corrections,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there should be an explicit warning before every FRCP Rule 41(b) *sua sponte* dismissal.

2. Whether trial courts must consider less drastic alternative sanctions before dismissal.

3. Whether dismissal of a civil cause of action is an appropriate sanction where there is no deliberate delay or contumacious conduct.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

NATURE OF THE CASE 2

STATEMENT OF FACTS 3

STATEMENT OF JURISDICTION BELOW 5

REASONS FOR ALLOWANCE OF THE WRIT 5

I. WHETHER THERE SHOULD BE AN EXPLICIT WARNING BEFORE EVERY FRCP RULE 41(B) SUA SPONTE DISMISSAL 6

II. WHETHER TRIAL COURTS MUST CONSIDER LESS DRASTIC ALTERNATIVE SANCTIONS BEFORE DISMISSAL 11

III. WHETHER DISMISSAL OF A CIVIL CAUSE OF ACTION IS AN APPROPRIATE SANCTION WHERE THERE IS NO DELIBERATE DELAY OR CONTUMACIOUS CONDUCT 14

CONCLUSION 16

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Ball v. City of Chicago, 2 F.3d 752 (7th Cir. 1993)..10, 13

Bishop v. Cross, 790 F.2d 38 (6th Cir. 1986)..... 15

Carter v. City of Memphis, 636 F.2d 159 (6th Cir. 1980)..... 15

Donnelly v. Johns Manville Sales Corporation, 677 F.2d 339 (3rd Cir. 1982)..... 13

Durham v. Florida East Coast Railway Co., 385 F.2d 366 (5th Cir. 1967)..... 15

Harris v. Callwood, 844 F.2d 1254 (6th Cir. 1988) ..10, 15

In re Eisen, 31 F.3d 1447 (9th Cir. 1994) 5, 7, 11, 12

In re Oil Spill of the Amaco Cadiz, 954 F.2d 1279 (7th Cir. 1992) 9

Johnson v. United States Dept. of the Treasury, 939 F.2d 820 (9th Cir. 1991)..... 10

Kilgo v. Ricks, 983 F.2d 189 (4th Cir. 1993).....10, 12

Link v. Wabash, 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962)..... 15

McCloud River R. Co. v. Sabine River Forest, 735 F.2d 879 (5th Cir. 1984)..... 13

McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554 (5th Cir. 1981)..... 13

Morgan v. Massachusetts General Hospital, 901 F.2d 186 (1st Cir. 1990)..... 15

Oliva v. Sullivan, 958 F.2d 272 (9th Cir. 1992).....10, 11

TABLE OF AUTHORITIES – Continued

Page

In re Osinga, 91 B.R. 893 (9th Cir. BAP 1988)..... 11

Schilling v. Walworth Country Park & Planning Commission, 805 F.2d 272 (7th Cir. 1986)..... 10

Titus v. Mercedez Benz of North America, 695 F.2d 746 (3rd Cir. 1982)..... 13

Velasquez Rivera v. Sea-Land Services, Inc., 920 F.2d 107 (1st Cir. 1990).....10, 13

Webber v. Eye Corp., 721 F.2d 1067 (7th Cir. 1983).... 15

STATUTES

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1291.....1, 5

28 U.S.C. § 1294.....1, 5

28 U.S.C. § 1331.....1, 5

28 U.S.C. § 1343..... 1

48 U.S.C. § 1424.....2, 5

FEDERAL RULES

FRCP Rule 41(b)..... *passim*

OTHER AUTHORITIES

Sup. Ct. R. 13.1 1

Sup. Ct. R. 16.3 .....6, 14

OPINIONS BELOW

The Order of the United States District Court for the Territory of Guam dismissing the petitioner's complaint CV 86-00032, filed September 15, 1993 is at A-9. The Memorandum of the United States Court of Appeals For the Ninth Circuit (Case No. 93-16947) filed February 3, 1995 is at A-1. This petition seeks review of the Memorandum from the United States Court of Appeals for the Ninth Circuit (not for publication) affirming the Order of the United States District Court for the Territory of Guam. A-1.

STATEMENT OF JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was filed February 3, 1995. This petition is filed within 90 days of such filing/entry pursuant to Supreme Court Rule 13.1. The statement of the jurisdiction of this Court is submitted pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Title 28 United States Code, § 1254

Title 28 United States Code, § 1291

Title 28 United States Code, § 1294

Title 28 United States Code, § 1331

Title 28 United States Code, § 1343

Title 48 United States Code, § 1424

Rule 41 Federal Rules of Civil Procedure

STATEMENT OF THE CASE

Nature of the Case

This is a civil rights action filed by petitioners against respondents in the United States District Court for the Territory of Guam (CV 86-00032) for violation of the civil rights of petitioner's son, John Marvin Blas. Another action was later brought on by the petitioner against the same respondents in the Superior Court of Guam (CV 1103-86) for wrongful death. On March 15, 1991, the District Court ordered that the case be stayed pending resolution of the Superior Court action pending at that time before the Ninth Circuit Court of Appeals. A-21. Both parties were also ordered to notify the court in writing immediately upon receipt of the issuance of an opinion by the Ninth Circuit in the corollary Superior Court case. A-21. The Ninth Circuit filed an Opinion on the Superior Court case on July 31, 1991. A-15. Petitioner's petition for a rehearing was denied by the Ninth Circuit on September 18, 1991. A-14. The Superior Court action was terminated on March 9, 1992, when certiorari was denied by the Supreme Court. A-14. On August 27, 1993, the United States District Court for the Territory of Guam issued an Order to Show Cause ("OSC") why the case should not be dismissed for failure to notify the Court of the October 1991 resolution of the corollary Superior Court Case by the Ninth Circuit. A-12. Both parties submitted memoranda in response to the OSC and

a hearing was held on September 10, 1993. A-9. On September 15, 1993, the District Court dismissed the instant case for failure to prosecute and for failure of the parties to notify the court of their receipt of the Opinion of the Ninth Circuit regarding the Superior Court case pursuant to the District Court's Order dated March 15, 1991. A-21. Petitioner appealed to the Ninth Circuit, Case No. 93-16947. The Ninth Circuit, in a Memorandum filed February 3, 1995, affirmed the Order of the District Court. A-1. This petition seeks review of the Ninth Circuit's Memorandum affirming the District Court Order. A-1.

Statement of Facts

On January 17, 1984, John Marvin Blas ("decedent"), petitioner's son, an inmate at the Department of Corrections ("DOC"), Government of Guam, was brutally murdered while in custody in his cell, in Building "D." DOC Building "D" was designated to house long-term and/or hardened criminals. At the time of his death, decedent was a first time adult offender for a non-violent crime and had only a few months to serve before his release. The Government of Guam and the respondents were on notice of the extreme danger to decedent from the other inmates in Building "D" because Building "D" had a history of extreme violence among inmates.

On August 8, 1983, decedent pleaded guilty in Criminal Case No. 36F-83. On September 2, 1983, he appeared for sentencing and pursuant to a plea agreement a hearing was held in chambers as to where to confine decedent. The Court recommended that the decedent be confined at the Agana (Guam Police Department) lock-up

or that he be sent to an off-island facility because of the real danger to his safety at DOC.

At the January 6, 1984 and January 9, 1984 hearings to modify decedent's sentence, the court found that the government had not acted per the Court's recommendations regarding the decedent's safety. On January 12, 1984, it reduced the decedent's remaining confinement to only four months. Respondent Vicente Castro, DOC Superintendent, was personally present at the hearing. Even after the murder of another inmate on January 1, 1984 in the same cell where decedent was confined, no actions were taken by the government and respondents to protect the life and ensure the safety of decedent; nor was decedent transferred to the Guam Police Department lock-up or sent off-island as agreed on July 12, 1983 and recommended by the judge during a chamber hearing on September 19, 1983. On January 17, 1984, decedent was murdered.

The complaint for civil rights violations in the case at hand was filed in the United States District Court for the Territory of Guam on May 20, 1986. Named defendants were the Government of Guam, and respondents Jose T. Charfauros, individually and in his official capacity as DOC Director, Frederick B. Quinene, individually and in his official capacity as DOC Deputy Director, and Vicente Castro, individually and in his capacity as DOC Superintendent of Facility. The complaint also requested the court to exercise its pendent jurisdiction on local causes of action incorporated in the complaint.

Statement of Jurisdiction Below

The statutory basis for federal jurisdiction in the United States District Court for the Territory of Guam is found in 28 U.S.C. § 1331 and 48 U.S.C. § 1424. The United States Court of Appeals for the Ninth Circuit had jurisdiction on hearing the appeal pursuant to 28 U.S.C. Sections 1291, 1294(4). The petitioner seeks to review the Memorandum of the Ninth Circuit filed February 3, 1995 affirming the Order of the United States District Court for the Territory of Guam.

REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit Memorandum affirming the Order of the United States District Court for the Territory of Guam dismissing petitioner's complaint after a *sua sponte* Order to Show Cause resolved a federal issue in a way that conflicts with the decisions of other circuits of the U.S. Court of Appeals. The Ninth Circuit Memorandum held that the District Court did not abuse its discretion by concluding that dismissal was the appropriate sanction. The Ninth Circuit arrived at this conclusion after weighing five factors: (1) the public's interest in expeditious resolution of the case; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994).

I.

Whether There Should Be an Explicit Warning Before Every FRCP Rule 41(b) Sua Sponte Dismissal

The District Court Order dismissed the petitioner's complaint on two grounds: (1) the parties failed to notify the court immediately when the Ninth Circuit disposed of the corollary Superior Court case; (2) prejudice to defendants resulting from the death of defendant Jose C. Charfauros. A-9. This dismissal was before the District Court based on the Court's *sua sponte* Order To Show Cause ("OSC") why the case should not be dismissed for failure to prosecute. A-12. Both parties submitted memoranda in response to the OSC and a hearing was held on September 10, 1993. A-9. On September 15, 1993, the District Court dismissed the instant case for failure to prosecute and for failure of the parties to notify the court of their receipt of the Memorandum of the Ninth Circuit regarding the Superior Court case pursuant to the District Court Order dated March 15, 1991. No other prior warning whatsoever was given by the court that the case was subject to dismissal if it was not prosecuted diligently. In fact, the OSC stated that if nothing was filed before the OSC was considered, then the court would dismiss the case *sua sponte*. A-12.

Petitioner, in her opposition to the OSC and in her opening brief to the Ninth Circuit, noted that the District Court Order signed by Judge Munson was directed to both parties. A-21. Secondly, petitioner asserted that her failure to notify the court was due to her counsel's misreading of Supreme Court Rule 16.3, and not a product of any dilatory or contumacious conduct. Thirdly, petitioner

maintained that her failure to comply with the court order was not due to bad faith or a wilful or conscious disregard of the said order. The Ninth Circuit, applying the five factors specified in *In re Eisen, supra,* held that: (1) the District Court did not abuse its discretion in finding unreasonable delay by petitioner; (2) petitioner's failure to notify the court of the Ninth Circuit resolution of the corollary Superior Court case impeded the court's ability to manage its docket; (3) the death of respondent Charfauros, who had a supervisory role over the two remaining defendants, prejudiced the defense; (4) given the prejudice to the respondents caused by the delay and the death of Charfauros, dismissal was an appropriate sanction; and (5) of the five factors considered, only the disposition of the case on the merits favored petitioner. A-1, 7.

In *Eisen, supra,* the court found that the plaintiff's failure to act for four years was egregious and that the prosecution had remained dormant too long. In the instant case, the time that elapsed between the resolution of the corollary Superior Court case in the Ninth Circuit (filed July 31, 1991, A-15) and the date of the Order to Show Cause (filed August 27, 1993, A-12) was approximately two years. However, the time elapsed from the denial by the Supreme Court of the United States of the petition for certiorari (dated March 9, 1992, A-13) to the OSC was less than a year and six (6) months. This delay was due to petitioner's counsel's misreading of Supreme Court Rule 16.3 that an order would be sent from the Supreme Court to the courts below that the petition had been denied. It was not a conscious or contumacious act to delay. It must be considered that petitioner's son, John

Marvin Blas, was murdered while in confinement due to the negligence of the respondents. There was no reason for petitioner to delay the proceeding under the circumstances. Under the circumstances, the failure by *both* parties to notify the court of the Ninth Circuit decision is not so egregious as to justify dismissal of appellant's cause of action.

In its order dismissing the complaint against all defendants, the District Court stated that the prejudice to defendants could not be cured easily, as suggested by petitioner's counsel, because the other defendants were supervised by Charfauros and thus the responsibility for decedent's incarceration was Charfauros' alone. A-9, 11. This is simply not so. There was no evidence of this on the record. No evidentiary hearing was held on this genuine issue of material fact. The trial court unilaterally concluded that the government would be severely handicapped in defending this case if it could not present the testimony of the person purportedly responsible for the decision complained of. There was no evidence regarding the decisions pertaining to decedent's confinement presented at any hearing prior to or at the OSC hearing.

Some questions regarding Charfauros indeed remain to be answered: (1) Why did the defendants' counsel prepare the alleged affidavit of Jose Charfauros and not attach it to his memorandum in support of the OSC? (2) Why did counsel not present the alleged affidavit at the OSC hearing along with a death certificate? (3) Did defendants' counsel know about the condition of Charfauros when he prepared the alleged affidavit? (4) If defendants' counsel knew about Charfauros' condition when he prepared this affidavit, why did he not inform the court and

plaintiffs about it? (5) When did defendants' counsel actually prepare the alleged affidavit? These questions alone support petitioner's position that the petition for certiorari be granted; upon resolution of the legal issues presented, this matter should be remanded for findings on the merits and on these ethical and procedural matters as well.

The District Court dismissed the Government of Guam and the other defendants in their official capacities from this case on October 27, 1986. Despite this fact, the Office of the Attorney General, Government of Guam is still representing the defendants in their individual capacities. If the case against Charfauros cannot be prosecuted, petitioner submits that the case against Quinene and Castro should proceed to trial. If Quinene and Castro committed the acts as alleged, then they should be responsible for them, just as Charfauros would have been responsible for his own individual acts. Respondent Vicente Castro attended the hearing regarding the dangers to the safety of John Marvin Blas and was therefore aware of the extreme danger to John Marvin Blas from the other inmates.

The fourth factor, disposition of the case on the merits weighed heavily in petitioner's favor. A-7. The fifth factor, availability of less drastic alternatives was not even considered by the District Court, and the Ninth Circuit simply concluded that because of prejudice and delay, dismissal was appropriate. This factor will be discussed as issue II.

Discretion is not unbridled, it is exercised under law. *In re Oil Spill of the Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir. 1992). Fairness requires that some limits be placed on

its use. *Velasquez Rivera v. Sea-Land Services, Inc.*, 920 F.2d 107 (1st Cir. 1990). In *Ball v. City of Chicago*, 2 F.3d 752, 755 (7th Cir. 1993) the court held that there should be an explicit warning before dismissal in every case. Many cases in the Seventh Circuit and other circuits agree. *See, e.g., Schilling v. Wolworth Country Park & Planning Commission*, 805 F.2d 272, 275-77 (7th Cir. 1986); *Harris v. Callwood*, 844 F.2d 1254 (6th Cir. 1988); *Velasquez Rivera v. Sea-Land Services, Inc., supra* (1st Cir.); *Kilgo v. Ricks*, 983 F.2d 189 (4th Cir. 1993). The Supreme Court should review with even closer scrutiny cases such as the case at hand involving *sua sponte* dismissals. While the Ninth Circuit affirmed the District court's *sua sponte* dismissal in the instant case, the Ninth Circuit reversed and remanded the action in *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992) because the trial court failed to consider less drastic alternatives; the appellate decision in *Oliva* also considered the *lack of warning to Oliva's counsel* of the imminent dismissal of the case. In yet another case, the Ninth Circuit stated that in cases involving *sua sponte* dismissal of an action rather than dismissal following a notice of motion under Rule 41(b), Fed. R. Civ. P., the district judge has an obligation to warn the plaintiff that dismissal is imminent. *Johnson v. United States Dept. of the Treasury*, 939 F.2d 820, 825 (9th Cir. 1991).

The Supreme Court is the only court that can establish consistency among the circuits. If the Supreme Court grants the petition, it can fashion a test that will assure consistency among the circuits concerning FRCP Rule 41(b) dismissals, i.e., an explicit warning must be given to all parties in every case before dismissal can be ordered, as stated by the Seventh Circuit in *Ball, supra*. Petitioner therefore prays that the petition be granted.

II.

Whether Trial Courts Must Consider Less Drastic Alternative Sanctions Before Dismissal

The District Court, in its Order dated and filed September 15, 1993 (A-9), did not consider any alternatives or less drastic action before dismissing the case. It dismissed the case because it believed that there was prejudice to defendants and lack of diligence in prosecuting the case. The Ninth Circuit Court affirmed. In *Eisen, supra,* the Ninth Circuit reiterated its holding that consideration of alternatives is not necessary in dismissing a case. The court explained:

> We have never held that explicit discussion of alternatives is necessary for an order of dismissal to be upheld. (Citation omitted). As the [Bankruptcy Appellate Panel] stated in *Osinga,* "[u]nder egregious circumstances, it is unnecessary (although helpful) for a trial court to discuss why alternatives to dismissal are infeasible." (Citation omitted).
>
> . . . .
>
> This case is distinguishable from *Oliva v. Sullivan,* 958 F.2d 272 (9th Cir. 1992) in which we reversed a dismissal because the court *sua sponte* dismissed a case without considering alternative sanctions or giving a warning. We noted that "[n]othing in the record demonstrates that counsel was on notice that the case would be dismissed" and that the facts were not so egregious as to "obviate the need for explicit discussion of alternatives". . . . moreover, *Oliva* involved a *sua sponte* dismissal and the court recognized that "[i]n cases involving *sua sponte* dismissal of an action, rather than dismissal following a noticed

> motion under Rule 41(b) [brought by the defendant] . . . there is a closer focus on the failure to consider less drastic alternatives and the lack of warning of eminent dismissal.". . . .

Eisen, supra, at 1454-1455.

The instant case involves a *sua sponte* dismissal. There was no noticed motion under FRCP Rule 41(b). The court simply issued its Order To Show Cause why the case should not be dismissed for failure to comply with the Court's order dated March 15, 1995. The District Court itself stated that if nothing was filed, the case would be dismissed *sua sponte.* Finding no appropriate filing, despite the fact that both parties filed memoranda responding to the OSC, the court dismissed the case.[1] The Ninth Circuit affirmed. The instant affirmance by the Ninth Circuit is inconsistent with its decision in *Oliva, supra,* and in conflict with the other circuits, notably the First, Fifth, Seventh, and Eleventh Circuits.

In *Kilgo v. Ricks,* 983 F.2d 189, 192 (11th Cir. 1993), the Court held that because dismissal is so drastic, a district court may dismiss a case with prejudice only where there is a clear record of delay or willful contempt and *a finding that lesser sanctions would not suffice.* In *Ball, supra,* the Seventh Circuit, citing to First, Second, Third Circuit cases, stated that a district judge should consider the

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[1] When Senior Judge Cristobal Duenas retired, various judges for the Ninth Circuit were on rotation assignment to Guam. When the incumbent Judge John S. Unpingco was appointed to the Guam District Court, there was a pending order by Judge Munson to notify the court when the Ninth Circuit rendered its decision regarding the corollary Superior Court case.

efficacy of a less severe sanction before dismissing a suit for failure to prosecute and that dismissal should be employed only if the district court has determined that it could not fashion an equally effective but less drastic remedy. *Ball, supra,* 2 F.3d at 758, *citing Velasquez Rivera, supra,* 920 F.2d at 1076.

In *McCloud River R. Co. v. Sabine River Forest,* 735 F.2d 879, 883 (5th Cir. 1984) the court was compelled to vacate the District Court's dismissal because nothing in the record indicated that less severe sanctions were considered or, if considered, deemed futile. In *McGowan v. Faulkner Concrete Pipe Co.,* 659 F.2d 554, 557 (5th Cir. 1981), the court found that the dismissal was inappropriate and should be reversed because the district court should have considered a lesser sanction before resorting to dismissal. The Third Circuit agreed in *Donnelly v. Johns Manville Sales Corporation,* 677 F.2d 339, 342 (3rd Cir. 1982) where the court held that it is necessary for the district court to consider whether lesser sanctions would better serve the interests of justice. The Third Circuit reiterated this ruling in *Titus v. Mercedez Benz of North America,* 695 F.2d 746, 749 (3rd Cir. 1992).

These cases from the other circuits clearly indicate that the Ninth Circuit's decision herein regarding the FRCP Rule 41(b) *sua sponte* dismissal by the United States District Court for the Territory of Guam conflicts with the decisions of other circuits of the Court of Appeals on the same matter. Wherefore, petitioner respectfully requests an exercise of this Court's power of supervision and prays that the petition for certiorari be granted.

III.

Whether Dismissal Of A Civil Cause Of Action Is An Appropriate Sanction Where There Is No Deliberate Delay Or Contumacious Conduct

In both the District Court and the Ninth Circuit, Petitioner herein asserted that the failure to notify the District Court of the resolution by the Ninth Circuit of the corollary Superior Court case was not a willful dilatory action or a result of contumacious conduct. Then counsel of record, Attorney G.W.F. Gumataotao was operating under the understanding that under Supreme Court Rule 16.3 an order denying certiorari would be forthcoming from the Supreme Court to the courts below. Further, although petitioner's counsel should have informed the court about the Ninth Circuit decision and the Supreme Court denial, his failure to do so was not willful, and not dilatory, but rather the product of a misunderstanding or misreading of Supreme Court Rule 16.3 in that counsel expected an order to issue from the Supreme Court which would finalize the denial of the writ, and that this order denying the writ would be processed through the Ninth Circuit, then to the district court. Petitioner's counsel's action cannot be construed as dilatory or contumacious for it is clear that the delay in the prosecution was at most, a misunderstanding of the Supreme Court rule (It was this office's and Attorney Gumataotao's first petition to the Supreme Court.).

The records of this case, both in the corollary Superior Court action and in the instant case, do not support the notion that petitioner was dilatory or engaged in contumacious conduct as evidenced by the appeals to the District Court, Appellate Division, the Ninth Circuit and

the petition for a writ of certiorari to this Court. Petitioner acknowledges the inherent power of the court to control all matters before it, including the discretionary powers to dismiss when appropriate under FRCP Rule 41(b). *See, Link v. Wabash,* 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962). However, several Circuits have held that dismissal under FRCP Rule 41(b) should be applied only in extreme situations of deliberate delay or contumacious conduct. *See,* e.g., *Harris v. Callwood, supra; Carter v. City of Memphis,* 636 F.2d 159, 161 (6th Cir. 1980) (penalty of dismissal applies only in extreme situations of deliberate delay or contumacious conduct); *Bishop v. Cross,* 790 F.2d 38, 39 (6th Cir. 1986) (dismissal requires a degree of willfulness, bad faith or contumacious conduct); *Morgan v. Massachusetts General Hospital,* 901 F.2d 186, 195 (1st Cir. 1990) (appellant willfully violated procedural rule and court orders); *Webber v. Eye Corp.,* 721 F.2d 1067, 1069 (7th Cir. 1983) (dismissal with prejudice is a harsh sanction which should be employed only in extreme situations where there is a clear record of delay or contumacious conduct or when other less drastic sanctions have proven unavailing); *Durham v. Florida East Coast Railway Co.,* 385 F.2d 366, 368 (5th Cir. 1967) (dismissal with prejudice is warranted only when a clear record of delay or contumacious conduct by the plaintiff exists).

Although a number of the circuits agree that dismissal under FRCP Rule 41(b) should be exercised only in extreme cases of willful delay or contumacious conduct, under the Ninth Circuit rulings, neither willful delay nor contumacious conduct is a factor. The Ninth Circuit herein applied, although inconsistently, its five factors

approach in reviewing the Rule 41(b) dismissal by the United States District Court for the Territory of Guam. Petitioner respectfully requests that the Supreme Court exercise its power of supervision to clarify the various issues surrounding Rule 41(b) dismissals and eliminate conflict among the circuits on this matter. Based upon the foregoing considerations, Petitioner prays that the petition for a writ of certiorari be granted.

CONCLUSION

The instant case was dismissed by the district court because of the failure of the parties to notify the court of the resolution of the corollary Superior Court case by the Ninth Circuit Court of Appeals as required by the District Court Order filed March 15, 1991. A-21. No explicit unambiguous warning was given nor were less drastic sanctions considered by the court before dismissing this case. Petitioner asserts that FRCP Rule 41(b) dismissals, especially *sua sponte* dismissals, should only be applied to extreme situations of deliberate delay or contumacious conduct and that there must always be an explicit unambiguous warning and expressed consideration of lesser sanctions before a civil case can be dismissed, as required by a number of circuits. The Ninth Circuit's Memorandum affirming the decision of the United States District Court for the Territory of Guam dismissing the case herein for failure to prosecute conflicts with the decisions of other circuits on the same matter. The Supreme Court of the United States should exercise its power of supervision, resolve this conflict in the United States Court of Appeals, and fashion a test that will assure consistency

among the circuits concerning FRCP Rule 41(b) dismissals, especially *sua sponte* dismissals.

Wherefore, based upon all the foregoing reasons, petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf, and as Guardian for the Minor, Marvin John Borja, Plaintiff-Appellant, v. GOVERNMENT OF GUAM, Defendant, and JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDERICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam, Defendants-Appellees.	) No. 93-16947)) D.C. No.) CV-86-00032-JSU)))))))))))))))) MEMORANDUM*) (Filed Feb. 3, 1995)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Guam
John S. Unpingco, District Judge, Presiding

Submitted January 25, 1995**

Before: WALLACE, Chief Judge, HALL and KLEINFELD, Circuit Judges.

Mildred Louise Blas, as representative of the estate of John Blas, on her own behalf, and as guardian for Marvin Bojra, appeals the district court's sua sponte dismissal of her 42 U.S.C. § 1983 action for failure to prosecute and failure to comply with a court order. We have jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294(4), and we affirm.

I

Background

On May 20, 1986, Blas filed this 42 U.S.C. § 1983 action alleging that the defendant prison officials had failed to adequately protect her son, John Blas, from harm while he was in their custody. John Blas was murdered by another inmate while in prison. The action was dismissed in 1987, but reinstated on remand from the Ninth Circuit as to three individual defendants Charfauros, Quinene, and Castro acting in their individual capacity. Following reinstatement, the case was stayed pending the outcome of a related wrongful death action filed by Blas in the Superior Court of Guam.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Blas's request for oral argument is denied.

The superior court case was eventually dismissed and Blas appealed to the Ninth Circuit. On March 15, 1991, while the superior court case was pending on appeal, the district court issued another stay pending the outcome of appeal. The order required the parties to "notify the court in writing immediately upon receipt of the issuance of an Opinion by the Ninth Circuit in the corollary [superior court] case."

On July 31, 1991, we issued our opinion in the superior court case, dismissing the case for failure to file a timely notice of appeal. *See Blas v. Guam*, 941 F.2d 778 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1295 (1992). Neither party informed the district court of our decision. Blas filed a petition for certiorari with the Supreme Court, which was denied in March of 1992. The clerk of Supreme Court notified Blas's attorney of the decision by letter dated March 9, 1992. Blas failed to notify the district court of the Supreme Court's denial of certiorari.

In March if 1993, defendant Charfauros died. He was the Director of the Department of Correction at the time of the alleged civil rights violation occurred. As such, he had supervised both of the remaining defendants. Neither Charfauros nor any another potential witnesses were ever deposed.

In August of 1993, the court sua sponte issued an order to show cause why the action should not be dismissed for failure to comply with the court's March 15, 1991 order. Both sides briefed the issue and a hearing was held. On September 15, 1993, the district court dismissed the action for failure to prosecute. Blas timely appeals.

II

Analysis

A. Standard of Review

We review the district court's dismissal for failure to prosecute for an abuse of discretion. *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1445 (9th Cir. 1994); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.), *cert. denied*, 113 S. Ct. 321 (1992). Under this standard, a trial court's decision should not be overturned "unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *In re Eisen*, 31 F.3d at 1451.

B. Failure to Prosecute

"District courts have the inherent power to control their dockets and, 'in the exercise of that power they may impose sanctions including, where appropriate, . . . dismissal of a case.' " *Ferdik*, 963 F.2d at 1260 (quoting *Thompson v. Housing Authority*, 782 F.2d 829, 831 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986)). In addition, Fed. R. Civ. P. 41(b) provides for the involuntary dismissal of actions "[f]or failure of the plaintiff to prosecute or to comply with . . . any order of the court." Dismissal, however, is a harsh penalty and should only be imposed in extreme circumstances. *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1429 (9th Cir. 1990).

In determining whether to dismiss a case for failure to comply with a court order, the district court must weigh five factors including: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to

manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions." *In re Eisen*, 31 F.3d at 1451; *Thompson*, 782 F.2d at 831. The district court need not make explicit findings in order to show that it has considered these factors, but if it does not, we will review the record independently to determine if the court abused its discretion. *In re Eisen*, 31 F.3d at 1451; *Ferdik*, 963 F.2d at 1261.

1. Expeditious Resolution of Litigation

Blas's attorney argued before the district court and on appeal that the delay was reasonable based on his mistaken belief that he did not need to inform the court of this court's decision in the superior court case because he had sought Supreme Court review of that decision. In addition, he believed that he did not need to inform the court when he leared certiorari had been denied because he only received a letter from the clerk of the Supreme Court rather than a copy of the order denying certiorari. The district court did not abuse its discretion by rejecting these contentions. *See In re Eisen*, 31 F.3d at 1451-52. The district court's order clearly required Blas to inform the court "immediately upon the issuance of an Opinion by the Ninth Circuit."[1] Morover, almost a year and a half

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[1] On appeal, Blas argues that the order required that notice was to be given by the "parties" and that the defendants are also culpable for not complying with the court's order.

We agree that by the terms of the order, the defendants should have informed the court of the status of the superior court case. Nevertheless, as the district court observed, "they

elapsed between the time Blas learned that certiorari had been denied and the district court issued the an order to show cause. Given these circumstances, the district court did not abuse its discretion by finding "unreasonable delay" by Blas. *See id.*

2. Court's Need to Manage its Docket.

Here, the delay cause by Blas's failure to notify the court could reasonably impede the court's ability to manage its docket and supports the court's dismissal. *See id.* at 1452.

3. Prejudice to the Defendants

Defendant Charfauros died during the delay. The prejudice to Blas's claim against him is obvious. Moreover, because of his supervisory role over the two remaining defendants, we cannot say that their claims of prejudice resulting from his death "are either illusory or relatively insignificant when compared to the force of

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were not interested in pursuing the case." Moreover, counsel for the defendants did contact Blas's attorney in January of 1993 to inquire of the status of the case. Counsel for the defendants reminded the plaintiff of the district court's order and specifically told Blas's attorney that they were not going to pursue the action. Given these circumstances and the respective roles of the plaintiff and the defendant in this type of action, the district court did not err by finding that the failure of the defendants' counsel to keep the court informed did not excuse Blas.

[the plaintiffs] excuse." *See id.* at 1453 (quotations omitted). Accordingly, district court did not abuse its discretion by finding that the defendants had been prejudiced by the delay. *See id.* at 1453-54.

4. Disposition of Case on its Merits

This factor weighs in favor of Blas. Nevertheless when weighed against the delay and prejudice to the defendants, it does not provide a basis for finding that the district court abused its discretion. *See id.* at 1454 ("court weighs this factor against the plaintiff's delay and the prejudice suffered by the defendant").

5. Availability of Less Drastic Sanctions

Given the prejudice to the defendants from the delay and from Charfauros's death, the district court did not abuse its discretion by concluding that dismissal was the appropriate sanction. *See id.* at 1454-55.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf, and as Guardian for the Minor, Marvin John Borja, Plaintiff-Appellant, v. GOVERNMENT OF GUAM, Defendant, and JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDERICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam, Defendants-Appellees.	No. 93-16947 D.C. No. CV-86-00032-JSU District of Guam ORDER (Filed Apr. 20, 1995)

Before: WALLACE, Chief Judge, HALL and KLEINFELD, Circuit Judges.

The motion to stay the mandate is denied. The mandate shall issue 7 days from the filing of this order.

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

MILDRED LOUISE BLAS, et al., Plaintiffs, vs. GOVERNMENT OF GUAM, et al., Defendants.	Civil Case No. 86-00032 ORDER

This Case came before the Court on the Court's *sua sponte* Order to Show Cause why the case should not be dismissed for failure to prosecute, issued on August 27, 1993. Each party submitted memoranda. A hearing on the issue was held on September 10, 1993.

The Case was filed in 1986 seeking civil rights damages for the death in prison of an inmate. The case was stayed in 1991 pending appeal of the related Guam Superior Court case to the Ninth Circuit. The parties were both under an order, issued on March 15, 1991, to immediately notify the Court when the Ninth Circuit disposed of the case so that this case could proceed.

The Ninth Circuit resolved the case in October of 1991. Neither party notified the Court. Blas' attorney contends that he did not notify the Court because he appealed the case to the Supreme Court. The Supreme Court denied certiorari and Blas' attorney was notified of this by letter from the Supreme Court in March 1992. Blas' attorney still did not notify the Court. He contends that he was waiting for some further order of the

Supreme Court denying certiorari, which he had not yet received as of the date of the hearing some eighteen months later in September 1993.

The Defendants' attorney wrote Blas' attorney a letter in January 1993 reminding Plaintiffs that they were under a duty to notify the Court that the appeal is resolved. The government admitted that they did not notify the Court, but that as the defendant they were not interested in pursuing the case. In the meantime, Chargualaf, the head of Corrections at the time of the alleged civil rights violation, died in March 1993. Not only is Chargualaf unavailable, but the plaintiff minor son, on whose behalf this action was brought, is apparently unable to be found.

At the hearing on the Order to Show Cause, Plaintiffs maintained that they had not yet received an Order from the Supreme Court notifying them that certiorari had been denied. Neither did Plaintiffs' counsel provide the Court with the rule or legal citation which led them to believe that an order would be forthcoming. More importantly, Plaintiffs' counsel could not recite any efforts to follow up on the order with the Supreme Court despite months of inactivity. There was no diligent pursuit of final determination of the case.

This Court can dismiss an action for failure to prosecute where there is a marked lack of diligence. The Ninth Circuit has even stated "the law presumes injury from unreasonable delay." *States Steamship Company v. Philippine Airlines*, 426 F.2d 803, 804 (9th Cir. 1970). Dismissal for lack of diligent prosecution is appropriate in this case. *See Moore v. Teflon Communications Corp.*, 589 F.2d 959, 967 (9th Cir. 1978).

The government has been prejudiced by the delay because they cannot present the testimony of the chief witness who was responsible for the persons who were involved with Blas' death, Chargualaf. Plaintiff's counsel contends that this does not affect the case against the other named defendants, and that the case could proceed against the remaining defendants.

This prejudice cannot be cured as easily as suggested by Plaintiffs' counsel. Plaintiffs' complaint focuses on the type of incarceration suffered by the decedent, John Marvin Blas, and the resulting stabbing of John Marvin Blas. The responsibility for this choice of incarceration was Chargualaf's alone. The other defendants were supervised by Chargualaf. The government would be severely handicapped in defending this case if it could not present the testimony of the person responsible for the decision complained of.

For the foregoing reasons, the case is DISMISSED.

DATED: September 15, 1993.

/s/ John S Unpingco
JOHN S. UNPINGCO
District Judge

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf and as Guardian for the Minor, MARVIN JOHN BORJA, Plaintiffs, vs. GOVERNMENT OF GUAM, et al., Defendants.	Civil Case No. 86-00032 ORDER TO SHOW CAUSE (Filed Aug. 27, 1993)

IT IS HEREBY ORDERED that the parties may show cause in writing no later than September 3, 1993, why the case should not be dismissed for failure to comply with this Court's order of March 15, 1991, in failing to notify the Court of the October 1991 resolution of the related case in Civil Case No. 89-00052 by the Ninth Circuit. If nothing is on file by that time, the case shall be dismissed *sua sponte* by the Court. If either party files something opposing the dismissal of the action, the parties shall appear on September 10, 1993, at 9:30 a.m., to show cause to this Court why the case should not be dismissed.

SO ORDERED this 27th day of August, 1993.

/s/ John S Unpingco
JOHN S. UNPINGCO
District Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 9, 1992

Mr. Gary Wayne Francis
414 West Soldad Avenue
Suite 507, GCIC Bldg.
Agana, GU 96910

Re: Mildred Louise Blas, etc.
v. Government of Guam, et al.
No. 91-1215

Dear Mr. Francis:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf, and as Guardian for the Minor, Marvin John Borja, Plaintiff-Appellant, v. GOVERNMENT OF GUAM; JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDRICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam, Defendants-Appellees.	No. 90-16048 D.C. #CV-89-00052-DHM (District of Guam) ORDER (Filed Sep. 18, 1991)

Before: SCHROEDER, FLETCHER and FERGUSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf, and as Guardian for the Minor, Marvin John Borja, *Plaintiff-Appellant.* v. GOVERNMENT OF GUAM; JOSE T. CHAREAUROS, Individually and as Director of the Department of Corrections; FREDRICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTI CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam, *Defendants-Appellees.*	No. 90-16048 D.C. No. CV-89-00052-DHM OPINION

Appeal from the United States District Court
for the District of Guam, Appellate Division
Munson, Hatter and Duenas, Judges, Presiding

Argued and Submitted
May 7, 1991 – Honolulu, Hawaii

Filed July 31, 1991

Before: Mary M. Schroeder, Betty B. Fletcher and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Appeals

Dismissing an appeal from a decision of the Appellate Division of the District Court of Guam as untimely, the court of appeals held that Guam was not an agency of the federal government for purposes of the 60-day time limit on appeals in suits involving such agencies under Rule 4(a).

Appellant Mildred Louise Blas brought a wrongful death action against the government of Guam for the death of her son in a Guam prison. The Superior Court of Guam determined that her complaint was barred by the statute of limitations. The Appellate Division of the District of Guam affirmed. Blas' appeal to the Ninth Circuit was not filed within the 30-day period provided in Fed. R. App. P. 4(a)(1). Blas argued that she was entitled to the 60-day period provied in that Rule for cases in which the United States or one of its agencies is a party.

[1] While the Ninth Circuit has not previously decided whether Guam is a federal agency for purposes of Rule 4(a)(1), it has recognizes that Guam should be viewed as a federal instrumentality for some purposes. Nevertheless, the court has also recognized that the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal

agency for purposes of that Rule. [2] Consideration of the factors in *Diaz v. Trust Territory of the Pacific Islands* that led the court to conclude that the government of the Trust Territory of the Mariana Islands was a federal agency for purposes of the same Rule compelled the opposite conclusion in this case. Although the government of Guam, like that of the Trust Territory, performs the governmental function of administration of an unincorporated territory, its executive, unlike that of the Trust Territory, is elected by its own citizens. Guam collects an income tax to finance itself, and is included in the definition of "state" in several federal statutes. Thus, it is not treated as an arm of the federal government. Therefore, the appeal was dismissed as untimely.

COUNSEL

Gary W.F. Gumataotao, Law Office of Del Priore & Gumataotao, Agana, Guam, for the plaintiff-appellant.

Kenneth R. Orcutt, Assistant Attorney General, Agana, Guam, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Mildred Louise Blas appeals from a decision of the Appellate Division of the District Court of Guam affirming the Guam Superior Court's determination that her complaint was barred by the statute of limitations. The underlying suit was a wrongful death action against the government of Guam and various individual corrections

officers, based upon the death of her son in a Guam prison. *See* Guam Government Code §§ 65.00-.07. The dispositive issue here is whether the appeal is untimely because it was not filed within the 30-day period provided in Fed. R. App. P. 4(a)(1). Blas maintains that she is entitled to the 60-day period provided in that Rule for cases in which the United States or one of its agencies is a party. The issue before us is whether the government of Guam is an agency of the United States within the meaning of that Rule.[1]

[1] This court has not previously decided whether Guam is a federal agency for purposes of Rule 4(a)(1). We have recognized that Guam should be viewed as a federal instrumentality for some purposes. *See Ngiraingas v. Sanchez*, 858 F.2d 1368, 1370 (9th Cir. 1988), *aff'd*. 110 S. Ct. 1737 (1990); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). Nevertheless, the court has also recognized that

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[1] The Rule provides:

> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal agency for purposes of Rule 4(a)(1). *Hoag Ranches v. Stockton Prod. Credit Ass'n (In re Hoag Ranches)*, 846 F.2d 1225, 1227-28 (9th Cir. 1988).

The relevant analysis is provided by our decision in *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1404-05 (9th Cir. 1989). There, we considered whether the government of the Trust Territory of the Mariana Islands was a federal agency for purposes of the same provision. In *Diaz*, we considered six factors to be relevant: (1) the extent to which the entity at issue performed a governmental function: (2) the scope of the federal government's involvement in the management of that entity; (3) whether the entity's operations were financed by the federal government; (4) proprietary interests of persons other than the federal government; (5) whether the entity is treated as an arm of the federal government in federal statutes; and (6) whether the entity is treated as an arm of the federal government under the Federal Tort Claims Act. *Id.* We concluded that the Trust Territory was an agency of the United States because it performed a governmental function, its executive officer was appointed by the President with the advice and consent of the Senate, its operations were largely funded by the United States Treasury, and its litigation decision making processes included the United States government. *Id.* at 1405.

[2] Consideration of these factors in this case compels the opposite conclusion. Although the government of Guam, like that of the Trust Territory, performs the governmental function of administration of an unincorporated territory, its executive, unlike that of the Trust

Territory, is elected by its own citizens. *See* 48 U.S.C. §§ 1422, 1422a. Guam called a territorial income tax to finance itself. *See* 48 U.S.C. § 1421h, 1421i. It is included under the definition of "state" in several federal statutes, and is thus not treated like an arm of the federal government in that respect. *See, e.g.*, 42 U.S.C. §§ 1301, 8802. Finally, Guam asserts, and Blas does not dispute, that there is no federal involvement in its litigation decision making processes. Thus, each factor that supported our decision to treat the Trust Territory as a federal agency weighs against according such treatment to Guam.

For these reasons, we conclude that Guam is not an agency of the federal government for purposes of the 60-day time limit on appeals in suits involving such agencies under Rule 4(a). The appeal in this case was therefore untimely and must be DISMISSED.

IT IS SO ORDERED.

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her Own Behalf and as Guardian for the Minor, Marvin John Borja, Plaintiffs, vs. THE GOVERNMENT OF GUAM et al., Defendants.	Civil Case No. 86-00032 ORDER (Filed March 15, 1991)

This matter is stayed pending resolution of the corollary Superior Court Action now before the Ninth Circuit Court of Appeals. The status conference now scheduled for March 15, 1991, is taken off calendar. The parties shall notify the court in writing immediately upon receipt of the issuance of an Opinion by the Ninth Circuit in the corollary case.

IT IS SO ORDERED.

Dated this 15th day of March, 1991.

/s/ Alex R. Munson
ALEX R. MUNSON
Designated District Judge

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

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28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam,

and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P. L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

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28 U.S.C. § 1294. Circuits in which decisions reviewable [Caution: this section is set out in alternative language; see the Explanatory notes to this section]

[See the Explanatory notes to this section; if § 113 of Act July 10, 1984, amending § 402(b) of Act Nov. 6, 1978, should prevail, the text of this section shall read as follows:]

Except as provided in sections 1292(c), 1292(d), and 1295 of this title [28 USCS §§ 1292(c), (d), 1295], appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

(June 25, 1948, ch 646, § 1, 62 Stat. 930; Oct. 31, 1951, ch 655, § 50(a), 65 Stat. 727; July 7, 1958, P. L. 85-508, § 12(g), 72 Stat. 348; Mar. 18, 1959, P. L. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, P. L. 87-189, § 5, 75 Stat. 417; Apr. 2, 1982, P. L. 97-164, Title I, Part A, § 126 in part 96 Stat. illegible)

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch 646, § 1, 62 Stat. 930; July 25, 1958, P. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P. L. 96-486, § 2(a), 94 Stat. 2369.)

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28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United

States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, ch 646, § 1, 62 Stat. 932; Sept. 3, 1954, ch 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, P. L. 96-170, § 2, 93 Stat. 1284.)

48 U.S.C. § 1424. District Court of Guam; jurisdiction

(a) The judicial authority of Guam shall be vested in a court of record established by Congress, designated the "District Court of Guam," and such local court or courts as may have been or shall hereafter be established by the laws of Guam in conformity with section 22A of this Act [48 USCS § 1424-1].

(b) The District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28, United States Code [28 USCS § 1332] and that of a bankruptcy court of the United States.

(c) In addition to the jurisdiction described in subsection (b), the District Court of Guam shall have original jurisdiction in all other causes in Guam, jurisdiction over which is not then vested by the legislature in another court or other courts established by it. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by the laws of Guam for the purpose of determining the requirements of indictment by grand jury or trial by jury.

(As amended Nov. 6, 1978, P. L. 95-598, Title III, § 335(a), 92 Stat. 2680; Oct. 5, 1984, P. L. 98-454, Title VIII, §§ 801 in part, 803, Title X, § 1001 in part, 98 Stat. 1741, 1743, 1745.)

Federal Rules of Civil Procedure (FRCP Rule 41)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) ***By Plaintiff; by Stipulation.*** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) ***By Order of Court.*** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these

rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)